

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ACME Television Licenses of Ohio, LLC)	Facility I.D. No. 70138
Licensee of Station WBDT(TV))	NAL/Acct. No.: 1041420002
Springfield, Ohio)	FRN: 0000013011

**NOTICE OF APPARENT
LIABILITY FOR FORFEITURE**

Adopted: May 26, 2010

Released: May 27, 2010

By the Commission:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”), and Section 1.80 of the Commission’s Rules (“Rules”),¹ we find that ACME Television Licenses of Ohio, LLC (the “Licensee”), licensee of Station WBDT(TV), Springfield, Ohio (the “Station”), willfully and repeatedly violated Section 73.670 of the Rules, by failing to comply with the limits on commercial matter in children’s programming.² Based upon our review of the facts and circumstances before us, we conclude that the Licensee is liable for a monetary forfeiture in the amount of forty five thousand dollars (\$45,000).

II. BACKGROUND

2. In the Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. §§ 303a, 303b, and 394, Congress directed the Commission to adopt rules, *inter alia*, limiting the number of minutes of commercial matter that television stations may air during children’s programming and to consider in its review of television license renewal applications the extent to which the licensee has complied with such commercial limits. Pursuant to this statutory mandate, the Commission adopted Section 73.670 of the Rules, which limits the amount of commercial matter which may be aired during children’s programming to 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays. The Commission also stated that, a program associated with a product, in which commercials for that product are aired, would be treated as a “program-length commercial,” *i.e.*, the entire program would be counted as commercial time.³

3. On May 31, 2005, the Licensee filed its license renewal application (FCC Form 303-S) for Station WBDT(TV) (the “Application”) (File No. BRCT-20050531BSI). In response to Section IV, Question 5 of the Application, the Licensee stated that, during the previous license term, the Station failed to comply with the limits on commercial matter in children’s programming specified in Section 73.670 of the Rules. In Exhibit 19, the Licensee reported that during an audit in preparing its Application, it discovered that between September 6, 2003, and March 20, 2005, the Station exceeded the children’s

¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

² See 47 C.F.R. § 73.670.

³ *Children’s Television Programming*, Report and Order, 6 FCC Rcd 2111, 2118, *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

television commercial limits on 164 occasions. Of these overages, seven were less than 30 seconds, 19 were 30 seconds or longer but less than one minute in duration, 42 were one minute or longer but less than two minutes in duration, 82 were two minutes or longer but less than three minutes in duration, and 14 were three minutes or longer. The Licensee maintained that these overages were caused by two separate factors. First, the Licensee stated that “the Station’s traffic department incorrectly configured the format of children’s programming by failing to install software that would have restricted the ability to insert more than the allowed amount of commercials.” Secondly, the Licensee indicated that the Station mistakenly aired syndicated programming intended to be broadcast on weekdays, when commercial limits are 12 minutes per hour, during the weekends, when commercial limits are 10.5 minutes per hour, “without changing the computer software to reduce the amount of permissible commercial matter.”

4. The Licensee also reported that on September 24, 2002, the Station broadcast a commercial for the Nintendo GameBoy E-Reader during the WB network program entitled “Pokemon.” According to the Licensee, a “Pokemon” game card with the letters “MON” was displayed for one second during the commercial. The Licensee argued that “there is no reason to believe that the fleeting insertion of a commercial would have created confusion among children viewers about the nature of the entire 30-minute episode.” Furthermore, the Licensee asserted that it did not have any “advance warning from the network [WB] about the inclusion of the commercial,” and therefore did not have the ability to preempt the broadcast of the commercial. Finally, the Licensee maintained that it should be absolved from liability as the Commission did in *Broadcast of Super Bowl XXXVIII Halftime Show*.⁴ The Licensee stated that “the Commission absolved television licensees for programming violations contained in network programming that the licensee could not have anticipated or prevented.”

5. The Licensee stated that discovery of these instances demonstrate that its procedures and assurances of compliance from the Station’s Traffic Manager were inadequate. The Licensee contended that, as a result, it reprimanded the Station’s Traffic Manager and instituted new procedures “to minimize, if not eliminate, the risk of future violations of the commercial limitations in children’s programming.”

III. DISCUSSION

6. Station WBDT(TV)’s record during the last license term of exceeding the Commission’s commercial limits in children’s programming pursuant to Section 73.670 on 165 occasions constitutes an apparent willful and repeated violation of Section 73.670. We note that one of the overages was a program-length commercial.

7. With respect to the Station’s broadcast of the commercial for the Nintendo GameBoy E-Reader, the Licensee contended that the “Pokemon” game card appeared only for one second during the commercial. It is well established, however, that the determination as to whether a particular program is a program-length commercial is not dependent on the duration of the appearance of the program-related product in the commercial announcement. The Commission has stated on numerous occasions that, where a commercial announcement includes a product related to the program in which the commercial is broadcast, then the program is a program-length commercial regardless of the duration of the appearance of the program related product in the commercial.⁵ Moreover, we believe that, in the context of the

⁴ *Broadcast of Super Bowl XXXVIII Halftime Show*, 19 FCC Rcd 19230, 19240-41 (2004), *forfeiture order*, 21 FCC Rcd 2760 (2006), *recon. denied*, 21 FCC Rcd 6653 (2006), *vacated and remanded on other grounds*, *CBS Corp. v FCC*, 535 F.3d 167 (3d Cir. 2008), *vacated and remanded*, ___ U.S. ___, 129 S.Ct. 2176, 173 L.Ed.2d 1153 (2009), *remand pending* (3d Cir. No. 06-3575).

⁵ *UTV of San Francisco, Inc. (KBH-TV)*, Letter, 10 FCC Rcd 10986, 10988 (1995); *see also WPIX, Inc.*, Letter, 14 FCC Rcd 9077 (MMB 1999) (commercial for “Spirit of Mickey” home video showing brief image of Donald Duck on cover of video aired during “Quack Pack” program); *Act III Broadcasting License Corp. (WUTV (TV))*, Letter, 10 FCC Rcd 4957 (1995), *aff’d*, 13 FCC Rcd 10099 (MMB 1997) (Commercial for a fast food restaurant promoting a
(continued....)

cognitive abilities of young children, there is the potential for confusion between the GameBoy commercial and the “Pokemon” product, regardless whether any “Pokemon” character is depicted given the image of the “Pokemon” game card contained in the commercial, and for the consequent likelihood that children may associate it with the program.

8. The Licensee claimed that it should be absolved from liability for the program-length commercial that it aired because it resulted from an error which occurred in the programming supplied by the WB network. This does not relieve the Licensee of the responsibility for the violation. Although the licensee cited a case in which the Commission did not bring enforcement actions against certain licensees in an indecency matter, that case did not deal with the commingling of program content and commercial matter in children’s programming and therefore is inapposite. In addition, the cited case involved live programming and the Commission found that the licensees in question could not reasonably have anticipated the broadcast of the indecent material. This case, in contrast, involves pre-recorded programming that the licensee could have and should have viewed prior to its broadcast. Licensees have a particularly stringent obligation to ensure that programming targeted to children is suitable for children. Moreover, they can and should anticipate that children’s programming will include advertising, and they have a responsibility to ensure that it complies with the requirements imposed on such advertising by law. The Commission has consistently held that a licensee’s reliance on a program’s source or producer for compliance with children’s television rules and policies will not excuse or mitigate violations which occur.⁶

9. The Licensee also argued that the conventional overages were due to erroneously configuring the children’s programming software and unintentionally broadcasting Monday through Friday programming over the weekends. These contentions, however, do not relieve the Licensee of responsibility for the violations. The Commission has repeatedly rejected human error and/or inadvertence as a basis for excusing violations of the children’s television commercial limits.⁷ Further, although the Licensee asserted that it instituted new procedures to ensure future compliance, this does not relieve it of liability for violations which have occurred.⁸

10. This *NAL* is issued pursuant to Section 503(b)(1)(B) of the Act. Under that provision, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the

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trip to Disney World as a contest prize contained a brief image of Goofy and aired during the program “Goof Troop”).

⁶ See, e.g., *Act III Broadcasting License Corp. (WUTV (TV))*, Letter, 13 FCC Rcd 10099 (MMB 1997); *Max Television of Syracuse, L.P. (WSYT (TV))*, Letter, 10 FCC Rcd 8905 (MMB 1995); *Mt. Mansfield Television, inc. (WCAX-TV)*, Letter, 10 FCC Rcd 8797 (MMB 1995); *Boston Celtics Broadcasting (WFXT (TV))*, Letter, 10 FCC Rcd 6686 (MMB 1995). In *Max Television of Syracuse, L.P.*, *supra*, the Commission reached this conclusion despite the licensee’s assertion that the network feed of the programming was simultaneous with the broadcast and the station had no opportunity to delete the commercial before it aired. See 10 FCC Rcd at 8906.

⁷ See, e.g., *UTV of San Francisco, Inc. (KBHK-TV)*, *supra* at 10987; *Le Sea Broadcasting Corp. (WHKE(TV))*, Letter, 10 FCC Rcd 4977, 4978 (1995); *Buffalo Management Enterprises Corp. (WIVB-TV)*, Letter, 10 FCC Rcd 4959, 4960 (1995); *Gannett Massachusetts Broadcasting, Inc. (WLVI-TV)*, Letter, 9 FCC Rcd 1555 (MMB 1994); *Ramar Communications, Inc. (KJTV(TV))*, Letter, 9 FCC Rcd 1831 (MMB 1994); *Channel 12 of Beaumont, Inc. (KBMT-TV)*, Letter, 9 FCC Rcd 1825 (MMB 1995); *WKBD, Inc.*, Letter, 8 FCC Rcd 5079 (MMB 1993).

⁸ See, e.g., *WHP Television, L.P. (WHP-TV)*, Letter, 10 FCC Rcd 4979, 4980 (MMB 1995); *Mountain States Broadcasting, Inc. (KMSB-TV)*, Letter, 9 FCC Rcd 2545, 2546 (MMB 1994); *R&R Media Corporation (WTWS(TV))*, Letter, 9 FCC Rcd 1715, 1716 (MMB 1994); *KEVN, Inc. (KEVN-TV)*, Letter, 8 FCC Rcd 5077, 5078 (MMB 1993); *International Broadcasting Corp.*, Memorandum Opinion and Order, 19 FCC 2d 793, 794 (1969).

United States for a forfeiture penalty.⁹ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.¹⁰ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,¹¹ and the Commission has so interpreted the term in the Section 503(b) context.¹² Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”¹³

11. The Commission’s *Forfeiture Policy Statement* and Section 1.80(b)(4) of the Rules establish a base forfeiture amount of \$8,000 for violation of Section 73.670.¹⁴ In determining the appropriate forfeiture amount, we may adjust the base amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”¹⁵ In this case, an upward adjustment is justified in light of the number, duration, and nature of the commercial overages. Moreover, the violations occurred over an extended 18-month period. Accordingly, we find that the Licensee is liable for a forfeiture in the amount of \$45,000 for its apparent willful and repeated violation of Section 73.670. This represents an increase over the forfeiture assessed for comparable violations in previous renewal cycles.¹⁶ Given the numerous violations of the children’s TV commercial limits in recent years, it appears that the forfeiture amounts assessed previously have not had a sufficient deterrent effect. Thus, where, as here, a case presents violations that are comparable to violations reported in an earlier renewal cycle, we are raising the forfeiture levels to strengthen the deterrent effect.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission’s Rules, that ACME Television Licensee of Ohio, LLC is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of forty five thousand dollars (\$45,000) for its apparent willful and repeated violation of Section 73.670 of the Commission’s Rules.

13. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission’s Rules, that, within thirty (30) days of the release date of this *NAL*, ACME Television Licenses of Ohio, LLC SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the proposed forfeiture must be made by check or similar instrument, payable

⁹ 47 U.S.C. § 503(b)(1)(B); *see also* 47 C.F.R. § 1.80(a)(1).

¹⁰ 47 U.S.C. § 312(f)(1).

¹¹ *See* H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

¹² *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

¹³ 47 U.S.C. § 312(f)(2).

¹⁴ *See Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

¹⁵ 47 U.S.C. § 503(b)(2)(D); *see also Forfeiture Policy Statement*, 12 FCC Rcd at 17100-01; 47 C.F.R. § 1.80(b)(4); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section II.

¹⁶ *See Koplur Communications*, 8 FCC Rcd 7884 (1993).

to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank-Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

15. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Barbara A. Kreisman, Chief, Video Division, Media Bureau, and MUST INCLUDE the NAL/Acct. No. referenced above.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁷

18. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to ACME Television Licenses of Ohio, LLC, 2101 East Fourth Street, Suite 202A, Santa Ana, CA 92705, and to, Mr. Rick Ervin, 2101 East Fourth Street, Suite 202A, Santa Ana, CA 92705.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁷ See 47 C.F.R. § 1.1914.